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JANUARY 24, 1941

paid to the life cestui, unless the settlor has shown a clear intent to have such a variance from the ordinary rule. * * *

In the case of *Brown v. Sperry*, 181 So. 734, the court, after quoting sec. 233, Restatement of the Law of Trusts, said:

"* * * when a trustee sells trust property it is immaterial what its actual value is; whatever he receives for it becomes a part of the corpus of the estate."

In the case of *In re Baxter's Estate*, 297 N.Y.S. 885, the court, in construing a will said:

"The question first presented is whether the reference to 'net rents, income and profits' operates to give to the beneficiaries of income the gains, if any, realized upon the sale or liquidation of principal assets. The court holds that the phrase means nothing more than if the only word used was the word 'income'; * * * Hence the beneficiaries of income have no right in capital profits."

In the case of *Old Colony Trust Co. v. Comstock*, 195 N.E. 389, it was held (syllabus):

"Gains in value of investments belong to capital and are to be credited to principal of trust fund rather than to income, * * *"

I am of the opinion, therefore, that any profits which might be derived from the sale of Government bonds bought by you with restricted funds for the individual adult members of the Osage Tribe who do not have certificates of competency should be considered as principal, subject to be reinvested by you as trustee for the individual Indians, and not as "income" which you are directed to pay over to them.

This construction of the word "income" is in accord with departmental practice during the interim between the passage of the act of February 27, 1925, *supra*, and the act of June 24, 1938, *supra*. As pointed out above, the latter act incorporated the language of the former act in this respect. In my opinion the practice followed by the Department under the 1925 act was correct and is equally correct in administering the funds of these Osage Indians under the 1938 act.

The conclusion which I have reached seems to me to be inescapable in view of the policy pursued by Congress in connection with the individual affairs of these Indians. This policy seems to me to evidence a legislative judgment that these par-

ticular members of the Osage Tribe are not ready to receive any more of the corpus of their trust estate than is specifically directed to be paid to them by the act of June 24, 1938, *supra*.

NATHAN R. MARGOLD,
Solicitor.

Approved: January 24, 1941.
OSCAR L. CHAPMAN, Assistant Secretary.

ST. CROIX INDIANS—ORGANIZATION
UNDER § 16 OF INDIAN REORGANIZATION
ACT

January 29, 1941.

Syllabus

Since the St. Croix Indians of Wisconsin are not now recognized as a band, the only form of organization under section 16 of the Indian Reorganization Act now open to them is an organization of those St. Croix Indians designated by the Indian Office as having one-half or more Indian blood who are residing on the St. Croix Reservation. However, all the St. Croix designated by the Indian Office may adopt a temporary constitution establishing a band organization, independently of section 16 of the act, to obtain the status of a recognized band, with the possibility of later organizing as a band under section 16 of the act.

The proposed provisional constitution should be revised to distinguish, and to be appropriate to, the two alternatives.

Memorandum for the Commissioner
of Indian Affairs:

I am returning the letter to the Superintendent of the Great Lakes Agency which discusses the provisional constitution drafted for the St. Croix Indians under which they propose to organize as the St. Croix Band. The letter assumes that the organization is being undertaken under section 16 of the Indian Reorganization Act. However, it appears that the group organizing is neither a recognized tribe or band, nor a group of Indians resident upon a reservation. Therefore, this group is not entitled to organize under the IRA. Moreover, from the letter of November 3, 1939; from Mr. Phinney, Field Agent, submitting this constitution, and from the letter from Coordinator Burns of July 15, 1940, reporting recent action by these Indians, it appears that the organization is not in-

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tended to be one under the IRA but is to be a temporary organization for the purpose of achieving recognition of these Indians as an organized band. The apparent intent is to seek a permanent organization under the IRA as an organized band if the temporary organization proves successful.

This distinction between organization under the IRA and provisional organization outside the act is, of course, crucial. In view of the history of the organization problem confronting this group of Indians, my suggestion is that reconsideration be given to the purpose and type of organization. In any case, the constitution proposed needs correction as the document is not in good form for either type of organization.

The St. Croix Indians have long been known informally as the St. Croix Band, as the Lost Band of Chippewa Indians and as Chief Little Buck's Band. The Solicitor's Office held in a memorandum of February 8, 1937, that the action by the Department and by Congress in 1914 and 1915 based on the Wooster Investigation was conclusive that this group could not then be considered a recognized band. The Wooster Investigation found that these Indians were members and descendants of members of the Lac Courte Oreille and Fond du Lac Tribes and did not have a separate tribal status. However, in recent years at least, the St. Croix Indians have been active as a band with a representative organization and have persisted in seeking legal recognition of the band. This has been important to them in order that they might employ attorneys for the prosecution of tribal claims and in order that they might manage the land and other rehabilitation assets provided by the Government. Under the designation of "Survivors and Descendants of Chief Little Buck's Band" they have now employed an attorney, adopting one of the suggestions proposed by the Indian Office in the letter of April 24, 1940.

The land involved was purchased under the IRA for the St. Croix Indians of one-half or more Indian blood who might be designated by the Secretary of the Interior, and this land was declared a reservation on November 28, 1938. On November 10, 1938, the Commissioner of Indian Affairs had approved a roll of St. Croix Indians of one-half or more Indian blood. These Indians were grouped by him in a category designated Class A. Those in Class B were St. Croix Indians of one-half or more Indian blood who were married to white persons or Indians of other tribes and who were not approved as persons eligible for land assignments or organization. Indians in Class C were disapproved as having less than one-half Indian blood.

On the question of organization these Indians

were early informed that in order to organize under the IRA the organization must be based on the Indians residing on the St. Croix Reservation. The Indian Office letter of January 24, 1939, included suggestions for permitting other St. Croix Indians not on the reservation to join the organization by application. The letter from Mr. Phinney of November 3, 1939, reported the concern of the Indians over creating an organization based on residents of the reservation, since these residents were not representative of the St. Croix group, and the need for a temporary organization on a band basis. The Indian Office reply of April 24, 1940, approved by the Department, stated there was no objection to such a provisional constitution, agreeing that an organization of individuals on the reservation was not a satisfactory type of organization, but it suggested additional methods to secure a broader type of organization under the IRA after the organization was once established on the basis of residence. The report by Coordinator Burns of July 15, 1940, reiterated that the Indians did not seek to organize on a reservation basis under the IRA at this time but wanted a provisional band organization to secure recognition of the band.

I see no legal objection to setting up a provisional constitution for a band organization. If this constitution is approved by the Commissioner of Indian Affairs and the group is then dealt with by the Department as a band, it may, perhaps, later merit consideration as an "organized band" under the definition of the word "tribe" in section 19 of the IRA; when organization under section 16 is sought. The advantage is, of course, that the organization need not be based at the outset on the residents of the reservation. The band organization would be based upon the St. Croix Indians designated by the Commissioner as eligible for land assignments and organization, as these Indians would be all the St. Croix Indians now recognized by the Department as having full membership rights. As suggested in the Indian Office letter of January 24, 1939, other St. Croix Indians could be included upon application when they had thus demonstrated their desire for tribal membership. While some St. Croix Indians who had been previously considered by the St. Croix group as members would not be included in the band at the outset because of the half-blood rule and the distinction made by the Commissioner between Class A and Classes B and C, this would amount in legal effect to elimination by the Interior Department, ratified by the Indians, of persons not considered sufficiently identified by blood and by interest to be members of the band until they sought such identification by application.

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I do not suggest that any group of half-blood Indians could set up a band organization on a temporary basis and then organize as a recognized band under the IRA, but in this instance the St. Croix Indians have common property interests, a common history, and a common past identity as Chief Little Buck's Band. Moreover, they have functioned as a band in recent years.

I also do not suggest that a tribe or band eligible to organize under section 16 of the IRA may organize with the approval of the Department in a manner not in conformity with that section. My point is that this group of individuals designated as Indians by the Indian Office, not being eligible to organize as a complete group under section 16 of the act, may establish a provisional organization independently of that section. This organization may be recognized as a representative and responsible organization by approval by the Indian Office of the constitution, but such action would not, of course, prevent the Department from later recognizing such other organization under the IRA as may legitimately be established.

However, since the Indians may not fully appreciate the possibilities of organization of the residents of the reservation under the IRA, I suggest that two versions of the constitution be presented to them, one of which would be appropriate under the IRA and one appropriate for temporary use by the band organization until organization under the IRA is attempted. The differences in the adoption procedure should be explained. The IRA constitution must be adopted at an election called by the Secretary of the Interior at which 30 percent of the eligible voters vote, and must be approved by the Secretary of the Interior. In the case of the non-IRA constitution, the Indians may proceed to adopt it by a simple majority vote if they are satisfied with it as it is presented to them, and it may then be approved simply by the Commissioner of Indian Affairs, as in the case of other constitutions of Indian tribes not entitled to organize under the act.

The main points in the revision of the constitution may be outlined as follows:

1. *Preamble.* The IRA constitution should state that the Indians organizing are the St. Croix Indians of Wisconsin residing on the St. Croix Reservation. The non-IRA constitution can describe the Indians organizing as the recognized St. Croix Indians of Wisconsin, descendants and survivors of Chief Little Buck's Band of Chippewa Indians, who are seeking to reestablish a band organization.

2. *Membership.* The IRA constitution should include such membership provisions as were suggested in the letter of January 24, 1939. In addition it could include section 2 of the membership

provision of the constitution as proposed and revised by the Indian Office. A provision for descendants of members should include not only children of one-half or more Indian blood born since November 10, 1938, to members of the organization, but also children born of residents of the reservation. In the case of the non-IRA constitution, the membership provisions could be the same as those in the constitution, as proposed and revised by the Indian Office. I see no reason, however, for the elimination of the group of Indians included in the membership provisions in the constitution as submitted by the Indians, namely, the St. Croix Indians appearing on the Wooster roll and their descendants not affiliated with any other tribe and approved as one-half or more Indian blood, since this is a group of Indians which the Indian Office specifically recommended be referred to in the membership provisions in its letter of January 24, 1939.

3. *Powers.* Whichever form of organization is adopted, the organized group cannot be considered as an Indian tribe with sovereign powers of self-government. Such a conception is neither necessary nor appropriate since these Indians have been scattered groups long living under State law. However, they would have in relation to their land the full rights of a landlord. Both types of constitution can vest in the tribal council or business committee the authority to represent and negotiate on behalf of the tribe and to promulgate ordinances, subject to approval by the Secretary of the Interior, providing for the use of the reservation lands, the assignment of such lands, and the removal from the lands of nonmembers. In the case of the IRA constitution there should be included, in addition, the authority to prevent the alienation of the lands, and to employ counsel, the choice of counsel and the fixing of fees to be subject to the approval of the Secretary of the Interior. A band not organized under the IRA must have any attorney's contract approved as to all its terms, pursuant to 25 U.S.C.A. sec. 81.

4. *Amendments and ratification.* The IRA constitution must provide for the procedures required by the act and by the regulations. In both cases the duration of the constitution should be specified since the organization is considered to be temporary, a period of years being indicated for the automatic ending of the organization or for the calling of an election on the revocation of the constitution.

This office would be glad to assist in the redrafting of the constitution along the lines indicated.

NATHAN R. MARGOLD,
Solicitor.

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